Supreme Court, U.S.
FILED
MAY 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-1793

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

HARRY BONNER, JR.

Petitioner,

-

VS.

WALTER FORD, individually and in his official capacity as Deputy Sheriff of Dale County, Alabama; and DALE COUNTY, ALABAMA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF

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BEST AVAILABLE COPY

EDITOR'S NOTE

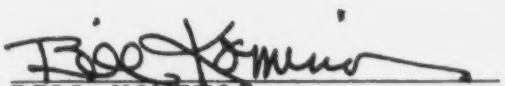
THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

Comes now the Respondent, Walter Ford, by and through his undersigned attorney and respectfully submits this brief in opposition to the Petition for Writ of Certiorari sought by Appellant.

It is Respondent's position that no genuine issue of law or fact is presented to this Honorable Court for review and therefore the Petition for Writ of Certiorari should be denied.

Respectfully submitted this 12th day of May, 1987.



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PARTIES TO THE PROCEEDINGS BELOW

Harry Bonner, Jr., Plaintiff

Represented by Honorable Malcolm R. Newman, Dothan, Alabama

Walter Ford, Respondent

Represented by Honorable Bill Kominos, Ozark, Alabama

Dale County, Alabama, Respondent

Represented by Honorable James W. Parkman, III, Dothan, Alabama

TABLE OF AUTHORITIES

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JURISDICTIONAL GROUNDS IN THIS COURT

Judgment was rendered in the United States District Court for the Middle District of Alabama, Southern Division, on March 28, 1986.

The jurisdiction of this Court arises under 28 U.S.C. Section 1254 and Rule 19, Rules of the Supreme Court of the United States, and comes before this Court on Plaintiff's Petition for Writ of Certiorari.

ISSUES PRESENTED FOR REVIEW

I. WHETHER THE TRIAL COURT AWARDED ADEQUATE DAMAGES.

II. WHETHER THE TRIAL COURT'S FAILURE TO AWARD PUNITIVE DAMAGES IS AN ABUSE OF DISCRETION.

STATEMENT OF THE CASE

The Respondent, Walter Ford, adopts as his statement of the facts in case the findings of the United States District Judge, Truman Hobbs, which are set out herein. The Trial Court in its memorandum opinion found as follows:

"Plaintiff has brought this action pursuant to 42 U.S.C. §1983 against Deputy Sheriff Walter Ford for wrongfully shooting plaintiff in the foot in violation of his Fourth and Fourteenth Amendment rights and against Dale County because Ford allegedly was acting pursuant to an unconsititional "deadly force" policy. The Court takes jurisdiction of this case under 28 U.S.C. §1331 and 1343. The nonjury trial of this cause was held on March 19, 1986, and the Court now enters its findings of fact and conclusions of law pursuant to Rule 52(a), Fed. R. Civ. P.

FACTS

On May 4, 1984, Kent Steward was arrested, apparently for possession of cocaine and marijuana. At the sheriff's office that afternoon, Stewart agreed to help the Dale County Sheriff's Department make an arrest of plaintiff, known at that time to Stewart as "Cooter Pill." On Ford's instructions, Stewart met plaintiff at a local bar, and arranged for plaintiff to meet him later that evening on the "Block," an area in Ozark, Alabama. Stewart rode to the rendezvous with Lieutenant Jones of the Dale County Sheriff's Department and Officer Speck, an Ozark police officer. Stewart identified plaintiff and told the officers that plaintiff was carrying marijuana in his right sock.

Officers Jones and Speck then released Steward and called defendant Ford for assistance. Jones and Speck began

walking toward plaintiff. Upon seeing them, plaintiff turned and began walding in the opposite direction toward Ford. Ford said to Plaintiff, "I need to speak to you". Plaintiff responded, "For what?" He then began to run. Simultaneously, Ford yelled: "Sheriff's Department - Halt." A chase ensued. Ford fired a "warning shot" into the air, but plaintiff continued to run with Ford in pursuit. Sheriff Mixon testified that his deputies were under orders never to fire a warning shot, and Deputy Ford testified that he had never fired a warning shot before this incident.

As plaintiff ran across the next street, Ford stated he saw plaintiff reach toward his right sock, and Ford thought plaintiff might have been reaching for a weapon. He had been informed that plaintiff was carrying marijuana in his socks. Plaintiff denied ever reaching toward his socks.

Plaintiff's flight led him to a fence, which he attempted to go over. Plaintiff testified that as he attempted to hurdle the fence, his shirt caught the top of the fence and caused him to fall. He testified that when he got up, he began to run to his left alongside the fence when he was shot. Ford, however, stated that he did not know a fence was there, and when he saw plaintiff making a "turning movement," he fired.

The bullet entered near the very bottom of Plaintiff's left heel and exited through the inside of his ankle. Plaintiff had no weapon, but several plastic bags of marijuana were found in his socks.

The sole eyewitness to this shooting was Mary Hazel Dawkins. Ms. Dawkins was sitting on her front porch with her grandchild. She heard a noise to her right, turned and saw plaintiff running very hard toward her fence. She looked again and saw

a second person running behind plaintiff. The second person shouted "Halt" more than once, and plaintiff began to leap the fence by swinging his legs across the top. She testified that just as plaintiff reached the top of the fence, he was shot and fell into her yard. She then heard a loud voice say "Now run," and she did with her grandchild. She then used the telephone in her house to call the police. The Court finds Ms. Dawkins' unbiased description of the incident to be the most credible.

An ambulance arrived shortly and took plaintiff to Dale County Hospital, which then referred him to Flowers Memorial Hospital. Plaintiff's medical expenses total $1,937.22.

Plaintiff testified that he retains a limp and continues to use a cane. Plaintiff said he left his cane at home the day of trial to avoid looking as though he was

seeking sympathy. However, two investigators with the Alabama Bureau of Investigation, Gerard Herring and Johnny Griffin, testified that on several occasions they had seen plaintiff walking normally and without a cane, with the only exception being when they saw him in court on another matter. No medical evidence was submitted suggesting that plaintiff has any permanent or continuing impairment from his injury.

Sheriff Mixon investigated the shooting and determined that Deputy Ford acted properly, and Lieutenant Livingston of the Alabama Bureau of Investigation also investigated and determined that Ford acted properly. However, Lt. Livingston concluded that the shooting was justified not only because he found that Ford was acting to protect himself, but also because it was necessary to prevent plaintiff's escape. In fact, Lt. Livingston testified that Ford acted as any

officer would in attempting to arrest a known drug dealer after he refused to halt.

Sheriff Mixon testified that his policy, which he conveyed to his deputies immediately after his taking office, denied any right to shoot a fleeing felon merely to prevent his escape. Under his policy an officer was authorized to use deadly force only when the officer or another was in imminent danger of death or serious injury.

CONCLUSIONS OF LAW

Plaintiff contends that Deputy Ford's shooting constituted an unreasonable seizure in violation of the Fourth and Fourteenth Amendments. Clearly, Ford's actions constituted a "seizure," and accordingly, Ford's use of deadly force was subject to the reasonableness requirement of the Fourth Amendment. See Tennessee vs. Garner, _____U.S._____, 1105 S.Ct. 1694,1699 (1985).

The United States Supreme Court recently addressed the reasonableness of deadly force and concluded that the use of deadly force to prevent the escape of felony suspects is unconstitutional unless the officer "has probable cause to believe that the suspect poses a threat of serious physical harm to the officer or others," or "if there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm." Id. at ____U.S. ____, 105 S.Ct. at 1700-01. See also Pruitt v. City of Montgomery, 771 F.2d 1475, 1482-83 (11th Cir. 1985); Acoff v. Abston, 762 F.2nd 1543, 1547 (11th Cir. 1985). No one suggests that there was any reason to believe that plaintiff had committed a crime "involving the infliction or threatened infliction of serious physical harm." Therefore, if Ford shot plaintiff merely to

prevent his escape, or if he did not have probable cause to believe plaintiff posed a threat of serious physical harm, Ford's action would violate plaintiff's rights as defined by the Supreme Court of the United States.

The undisputed evidence is that plaintiff was unarmed; Ford had no information to the effect that plaintiff was armed or dangerous; nor did Ford make any claim that he thought he saw any weapon. Plaintiff was not suspected of having committed a violent crime. In fact, the only evidence Ford had that plaintiff had committed any crime was that Kent Stewart had said plaintiff was carrying marijuana.

Apparently, Ford contends that his fear was reasonable because plaintiff reached toward his right sock and because plaintiff made a "turning movement." However, Ford had been informed that plaintiff

was carrying marijuana in his socks. Furthermore, Ford admitted that he never even saw plaintiff turn completely toward him. If the facts of this case could be regarded as providing probable cause to believe that the suspect posed a threat of serious physical harm, then the substantial protection which the Supreme Court sought in Garner to provide for the fleeing suspect would be largely illusory. Every chase of every suspect poses some threat of personal injury to the officer participating in the pursuit. It required physical courage and dedication to join in a hot pursuit as Officer Ford did on this occasion. But the Supreme Court has made clear that the use of deadly force simply is not permissible under circumstances such as were present in this case. In the opinion of this Court, when Officer Ford shot plaintiff he did not have a reasonable belief that

plaintiff was threatening his life or serious injury; accordingly, this Court must find that Deputy Ford violated the constitutional protection for plaintiff as defined by the Supreme Court.

As to plaintiff's claim against the County, the Court cannot find that Dale County's policy was unconstitutional. Sheriff Mixon testified that he had clearly informed his deputies of his policy immediately after his election, and his policy allows the use of deadly force only when the life of the officer or a third party is in danger. Because Sheriff Mixon's policy does not allow an officer to shoot merely to prevent escape, and requires at least a reasonable fear of imminent harm, if not the stricter requirement of an actual danger of harm, his policy provides at least the protection required by Garner and is therefore constitutional.

Officer Ford also raises the defense of good faith immunity. Dale County's policy was clear, however, prior to this occurrence that an officer could not shoot a fleeing suspect unless he had a reasonable belief that his life or serious injury was threatened. Since the Court has found that there was not a reasonable basis for a belief that Officer Ford's life or serious injury was threatened, his good faith immunity claim must fail.

Having now determined that Deputy Ford is liable to plaintiff for this shooting, the Court now must turn to the issue of damages to be awarded plaintiff. Plaintiff's medical expenses totalled $1,937.22. Plaintiff is entitled to recover these expenses. Undoubtedly, plaintiff suffered paid from the bullet wound. However, the testimony of Gerard Herring and Johnny Griffin indicated that plaintiff has not suffered nearly

as much pain as he would have the Court believe, and the Court found plaintiff's testimony lacked credibility in several respects. Accordingly, the Court feels a total sum of $8,000.00 is adequate to compensate plaintiff.

Plaintiff also seeks damages for humiliation because Ford allegedly stood over him and said, "Don't move, God damn it, I'll blow your damn brains out." However, nothing in this statement, though graphic, is actionable. Nor is the Court of the opinion that punitive damages are warranted in this case. Ford made a mistake and took a shot in the dark during a hard chase without the requisite probable cause as later determined by a court, but is was not such a heinous mistake under the circumstances as to justify punitive damages. Plaintiff and Ford are fortunate that the injury to plaintiff was not much more grave.

The Court also notes that defendants' counsel have attempted to make an issue of whether Ford acted in his official or his individual capacity for the purposes of liability and damages. Because Ford acted beyond the scope of his county's shooting policy and beyond state and constitutional law, his actions necessarily were taken in his individual capacity."

ARGUMENT AND CITATION OF AUTHORITIES

ISSUE ONE

WHETHER THE TRIAL COURT AWARDED ADEQUATE DAMAGES.

Petitioner states in his brief that Bonner still strides with a painful reminder of May 4, 1984. The Trial Court, hearing this case without a jury, concluded after presentation of all the evidence, that Bonner was not as seriously injured as his attorney states in his brief. The Court had before it evidence by two investigators with the Alabama Bureau of Investigation who testified that on several occasions they had seen Bonner walking normally without a cane. Bonner offered no medical evidence to suggest that he has any permanent or continuing impairment from his injury. No doctors were summoned by him to

testify to his injury or any permanent impairment that he may be suffering. Plenty opportunity existed for the Petitioner to subpoena medical experts in the case in order to give the Trial Judge an opportunity to assess and evaluate the Petitioner's injuries. The Court correctly assessed the Petitioner's injury and awarded commensurate compensatory damages. The Court awarded expenses totalling $1,937.22 and compensatory damages in the sum of $8,000.00. In awarding damages, the Court emphatically stated that "The testimony of Gerard Herring and Johnny Griffin indicate that Petitioner has not suffered nearly as much pain as he would have the Court believe, and the Court found Petitioner's testimony lacking credibility in several respects."

It has been consistently held by our courts that where a Trial Court has heard ore tenus testimony, its judgment or decree

based upon that testimony is presumed correct and will be reversed only if, after consideration of evidence and all reasonable inferences to be drawn therefrom, the judgment or decree is found to be plainly and palpably wrong. The Trial Court had before it certain testimony and evidence and rendered a judgment and decree based upon that testimony and evidence. Petitioner, obviously not being satisfied with the award of damages, now seeks to review the issue of damages before this Honorable Court. Respondent, Ford, contends that the Trial Court did not abuse its discretion but acted solely on the evidence presented during the trial and therefore no geniune issue is presented to this Honorable Court for review.

ISSUE TWO

WHETHER THE TRIAL COURT'S FAILURE TO AWARD PUNITIVE DAMAGES IS AN ABUSE OF DISCRETION.

It is generally held and recognized that punitive damages may be awarded under appropriate circumstances and private actions to recover for violations of federal civil rights statute. Lee vs. Southern Homes Cites Corporation, 429 Fed. 2nd 290; 14 ALR. Fed. 616.

It is conceded that punitive damages are available in proper cases under Section 1983 upon proper showing required for recovery. Punitive damages are never awarded as of right no matter how egregious the Defendant's conduct. Smith vs. Wade, 461 U.S. 30; 75 L Ed.2nd 632.

All cases are in agreement that a jury (the Court) may be permitted to assess punitive damages in the Section 1983 action

when the Defendant's conduct involves wreckless or callus indifference to the Plaintiff's federally protected rights as well as when it is motivated by evil motive or intent. The Trial Court recognized that the Respondent, Ford, made a mistake and that his actions were not motivated by any wreckless or callus indifference to Bonner's federally protected rights. The Court further found that Ford was not motivated by any evil motive or intent in shooting at Bonner as he was fleeing from a lawful arrest.

The Respondent, Walter Ford, takes the position that the Trial Court did not abuse its discretion in awarding compensatory damages and refusing to award any punitive damages.

Harry Bonner, through his able counsel, contends that his American dream of life, liberty and the pursuit of happiness was

shattered by a bullet fired by Deputy Walter Ford. Bonner's self-praise indicates that this model citizen who was pursuing his American dream was shot by Deputy Ford with no reason or justification. He claims that his dream is shattered and he "...will never know life, liberty and the pursuit of happiness as he once did ..."

"What's a Sweetheart like you
doing in a dump like this?"

Bob Dylan

Harry Bonner now resides in the Alabama State Penitentiary. He was convicted this year of selling a controlled substance presumably while in search of his American dream. The arrest and conviction came after he was found fleeing from Deputy Ford with numerous individually wrapped packets of marijuana in his socks. Walter Ford did not turn Harry Bonner's dream into a nightmare, it was his own flagrant disregard of law and justice that put him where he now resides.

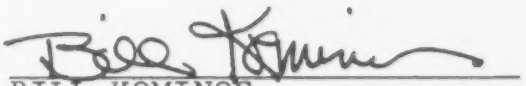
CONCLUSION

Your Respondent contends that the Trial Court has all the evidence before it in order to assess and evaluate Bonner's injuries. Upon doing so the Court awarded compensatory damages and stated in its memorandum opinion the reasons for doing so. The Petitioner in this case was not a law abiding citizen who was intentionally and maliciously injured. The Petitioner, Harry Bonner was a known drug dealer with packets of marijuana hidden in his sock who was fleeing from a lawful arrest. The Trial Court did not abuse its discretion in failing to award punitive damages as this is a case that clearly does not warrant an assessment of punitive damages.

The 11th Circuit Court of Appeals affirmed the Trial Judge's decision and

and it is urged that this Honorable Court will deny the Petition for Writ of Certiorari filed herein.

Respectfully submitted this 12th day of May, 1987.



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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Brief upon Hon. James W. Parkman, III, Attorney for Dale County, and upon Hon. Malcolm R. Newman, Attorney for Appellant, by regular mail, postage prepaid and properly addressed to each of them on this 12th day of May, 1987.

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